

IN THE COURT OF APPEALS OF TENNESSEE  
AT MORRISTOWN<sup>1</sup>  
October 14, 2003 Session

**JOHN R. REED, ET AL. v. CARTER COUNTY**

**Appeal from the Circuit Court for Carter County**  
**No. C8226     Jean A. Stanley, Judge**

**FILED NOVEMBER 25, 2003**

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**No. E2002-03131-COA-R3-CV**

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John R. Reed and wife, Margaret Reed, filed suit against Carter County, alleging they suffered personal injuries and property damage as a result of an accident that occurred while they were crossing a one-lane bridge built in 1916 or 1918. The plaintiffs were in a wagon being pulled by a horse and mule team. It is alleged that the mule slipped off the bridge causing the wagon to become entangled at the edge of the bridge. The bridge is owned and maintained by Carter County; it did not have guardrails. The plaintiffs charge that the “defective, unsafe, or dangerous condition of the bridge” proximately caused the accident and their resulting injuries and damages. The county filed a motion for summary judgment, raising the affirmative defense of governmental immunity pursuant to the Tennessee Governmental Tort Liability Act (“the GTLA”), Tenn. Code Ann. § 29-20-101, *et seq.* The trial court granted the motion. The plaintiffs appeal, arguing that the trial court erred in granting summary judgment. They argue that there is a genuine issue of material fact as to whether the bridge was “defective, unsafe, or dangerous.” In addition, they contend the trial court improperly weighed the evidence, rather than viewing it in the light most favorable to the plaintiffs as the nonmoving parties. We affirm the grant of summary judgment in part and reverse that grant in part and remand to the trial court for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court**  
**Affirmed in Part and Reversed in Part; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and THOMAS R. FRIERSON, II, SP. J., joined.

Robert J. Jessee, Johnson City, Tennessee, for the appellants, John R. Reed and Margaret Reed.

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<sup>1</sup>This case was heard in Morristown before students from Morristown East High School and Morristown West High School as a part of the Court’s C.A.S.E. (Court of Appeals Affecting Student Education) Project.

Dana C. Holloway and C. Christopher Brown, Knoxville, Tennessee, for the appellee, Carter County, Tennessee.

## OPINION

### I.

The complaint alleges negligence in very general terms:

The only public access to and from the Reed's [sic] home is across this bridge. On August 20, 2000, the plaintiff John Reed was driving a horse-drawn wagon across the bridge and the plaintiff Margaret Reed was riding in the back of the wagon. The wagon was being pulled by a horse and mule team owned by the Reeds. As the horse and mule were pulling the wagon across the bridge, the mule side-stepped a water puddle on the bridge and then slipped off the bridge, dragging the other horse, the wagon and the Reeds. The wagon caught on part of the bridge's super-structure and the wagon was thus prevented from falling completely off the bridge. Mrs. Reed was thrown violently about the back of the wagon. Mr. Reed was thrown forward, but was able to grab one of the bridge girders and thereby avoid falling into the river gorge fifty feet below. The other horse in the team had been dragged partially off the bridge when the mule fell, but other individuals with the Reeds were able to grab it and pull it back to safety. Mr. Reed and others cut the mule out of its harness and it fell into the river. The mule was injured, but survived the fall.

\* \* \*

The aforesaid personal injuries and property damage were proximately caused by the defective, unsafe, or dangerous condition of the bridge. The defendant Carter County owed a legal duty to the plaintiffs to maintain the bridge in a safe condition, which it failed to do.

(Paragraph numbering in complaint omitted). As can be seen, the complaint does not aver *how* the bridge was "defective, unsafe, or dangerous" or *how* the county failed to "maintain the bridge in a safe condition." Apparently, no attempt was made by the county to obtain a more definite statement of the plaintiffs' allegations of negligence. See Tenn. R. Civ. P. 12.05.

The parties undertook discovery to flesh out the factual basis of the plaintiffs' generally-worded complaint. That discovery established that the main thrust of the plaintiffs' complaint was (1) that the bridge was defective, unsafe, or dangerous because of the absence of guardrails; and, to

a lesser extent, (2) that the county's decision not to install guardrails amounted to negligence. The plaintiffs' response to the county's motion established an additional claim of negligence. The following statements in the plaintiffs' response are uncontroverted in the record:

Approximately six months to a year before the accident, the plaintiff, John Reed, told Jim Strickland, a foreman with the Carter County Highway Department, that the curb on the bridge was deteriorating and that the county needed to put a guardrail on the bridge. [Deposition of Jim Strickland @ 5.] The curbing was beginning to deteriorate. [Deposition of Jim Strickland @ 5.]

(Paragraph numbering in response omitted).

## II.

The county's motion for summary judgment was addressed to the sixth defense in its answer, as amended:

The Defendant avers that it is immune from suit pursuant to Tennessee Code Annotated [§] 29-20-201 et seq., and specifically Tennessee Code Annotated [§] 29-20-205(1). Defendant avers that the alleged acts of . . . Carter County in owning and maintaining the bridge in question constitute the exercise or performance or the failure to exercise or perform a discretionary function.

The trial court, in granting the county's motion, stated in its order that it could not "say that the subject bridge was defective, unsafe, or dangerous." In the same order, the trial court held that the decision to install or not install guardrails "is a discretionary function." It noted that the county had decided to install guardrails "some two weeks before [the plaintiffs] were injured," but had failed to install them before the accident. The court addressed this failure as follows:

It seems to this Court that the decision then is whether there was negligence in waiting two weeks to perform the installation. The decision when to install the guardrails was "operational" in nature. There is no evidence in the record that this two-week delay was unreasonable or negligent, especially where, despite Plaintiffs' complaints, there had been no accidents or injuries involving sober persons in over 80 years.

## III.

"Summary judgment involves only questions of law and not disputed issues of fact." *Edwards v. Hallsdale-Powell Util. Dist.*, 115 S.W.3d 461, 464 (Tenn. 2003). Therefore, our review

of a “grant of summary judgment is *de novo* without any presumption” of correctness as to the lower court’s ruling. **Webber v. State Farm Mut. Auto. Ins. Co.**, 49 S.W.3d 265, 269 (Tenn. 2001); *see also Edwards*, 115 S.W.3d at 464. As such, our review “is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56” have been met. **Staples v. CBL & Assocs., Inc.**, 15 S.W.3d 83, 88 (Tenn. 2000). In reviewing the record, “[c]ourts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party’s favor.” *Id.* at 89. Summary judgment is appropriate if “‘both the facts and conclusions to be drawn therefrom’” would “‘permit a reasonable person to reach only one conclusion.’” **Webber**, 49 S.W.3d at 269 (quoting **Seavers v. Methodist Med. Ctr. of Oak Ridge**, 9 S.W.3d 86, 91 (Tenn. 1999)); *see also Staples*, 15 S.W.3d at 89.

#### IV.

The plaintiffs contend that the trial court erred in granting summary judgment because, so the argument goes, a genuine issue of material fact exists as to whether the bridge was “defective, unsafe, or dangerous.”

Summary judgment is appropriately granted only after the moving party shows that “there is no genuine issue as to any material fact” and that he or she “is entitled to a judgment as a matter of law.” Tenn. R. Civ. P. 56.04; *see also Edwards*, 115 S.W.3d at 464. The moving party bears the burden of proving that the summary judgment motion satisfies Tenn. R. Civ. P. 56. **Staples**, 15 S.W.3d at 88. “To properly support its motion, the moving party must either affirmatively negate an essential element of the [nonmoving] party’s claim or conclusively establish an affirmative defense.” *Id.* Upon making a “properly supported motion,” the moving party’s “burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact.” *Id.* If the moving party succeeds in negating “an essential element” of the claim, the nonmoving party “must offer proof to establish” that “essential elements of the claim” exist; the “[nonmoving] party may not simply rest upon the pleadings.” *Id.* at 88-89.<sup>2</sup>

In this case, the defendant asserts the affirmative defense of governmental immunity under the GTLA. In response, the plaintiffs argue that governmental immunity was waived because the bridge was defective, unsafe, or dangerous.

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<sup>2</sup>The nonmoving party may establish that “essential elements of the claim” exist by

(1) *pointing to evidence overlooked or ignored by the moving party that establishes a material factual dispute*, (2) *by rehabilitating the evidence attacked in the moving party’s papers*, (3) *by producing additional evidence showing the existence of a genuine issue for trial*, or (4) *submitting an affidavit explaining why further discovery is necessary as provided for in Tenn. R. Civ. P. 56.06.*

**Staples**, 15 S.W.3d at 89 n.2 (emphasis added) (citations omitted).

The case of *Helton v. Knox County*, 922 S.W.2d 877 (Tenn. 1996), states the well-established principle, recognized in both common law and statutory law, that “governmental entities are generally immune from liability for any injury resulting from the exercise of governmental or proprietary functions.” *Id.* at 881. This principle is codified at Tenn. Code Ann. § 29-20-201(a) (2000):

Except as may be otherwise provided in [the GTLA], all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.

Under the GTLA, immunity is waived for injuries that are “proximately caused by a negligent act or omission of any [governmental] employee within the scope of his [or her] employment,” Tenn. Code Ann. § 29-20-205 (2000); however, immunity is preserved in such cases when the act or omission involves a “discretionary function,” Tenn. Code Ann. § 29-20-205(1). Immunity is also “removed for any injury caused by a defective, unsafe, or dangerous condition of any street . . . or highway, owned and controlled by such governmental entity.” Tenn. Code Ann. § 29-20-203(a) (2000). The provisions of Tenn. Code Ann. § 29-20-203(a), however, do not “create an exception for discretionary functions” when a claim is made that an injury has occurred as a result of a “defective, unsafe, or dangerous condition.” *Helton*, 922 S.W.2d at 885. The determination as to whether a highway or street “is defective, unsafe, or dangerous for purposes of waiving governmental immunity under [Tenn. Code Ann.] § 29-20-203 is a question of fact.” *Id.* at 882.

The Tennessee Supreme Court interpreted the GTLA in the *Helton* case. The facts in that case are somewhat similar to the facts now before us. In *Helton*, a driver was “killed when the vehicle he was driving went off” a bridge that did not have guardrails. *Id.* at 879. The driver’s widow sued Knox County under the GTLA, alleging that the “bridge was unsafe because there were no guardrails on it.” *Id.* at 879. The widow relied on Tenn. Code Ann. § 29-20-203(a), *id.*, which, as previously noted, waives governmental immunity for injuries caused by “defective, unsafe, or dangerous” conditions on the roadway. The Supreme Court, in clarifying an earlier decision of that court,<sup>3</sup> emphasized that “as a matter of law, lack of standard metal guardrails does not render a bridge . . . ‘defective, unsafe, or dangerous’ *per se*.” *Id.* at 882 n.10. The Supreme Court emphasized that, when analyzing similar cases, “courts should consider all of the physical aspects of a particular bridge, together with its location, the volume of traffic, the type of traffic it accommodates, and the history of accidents occurring there, to decide whether a particular bridge is ‘defective, unsafe, or dangerous.’” *Id.* In *Helton*, the Supreme Court held that, under the facts before it, the “lack of guardrails was not a defective, unsafe, or dangerous condition so as to waive” immunity under the GTLA. *Id.* at 885. The Supreme Court in *Helton* also analyzed Tenn. Code Ann. § 29-20-205 to determine whether the decision to install guardrails is a discretionary function. *Id.*, 922 S.W.2d at 885-87. After analyzing the question under the “planning-operational test” adopted in *Bowers v.*

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<sup>3</sup>See *Kirby v. Macon County*, 892 S.W.2d 403 (Tenn. 1994).

*City of Chattanooga*, 826 S.W.2d 427 (Tenn. 1992), the Supreme Court concluded that “the decision not to install guardrails was discretionary” and thus governmental immunity was preserved. *Helton*, 922 S.W.2d at 885, 887.

Thus, we are presented with two related, but different, questions. The first issue – and the only one that the plaintiffs really press on this appeal – is whether, in this case, the lack of guardrails rendered the bridge “defective, unsafe, or dangerous.” If there is a genuine issue of material fact as to this issue, the case must proceed to trial because, as previously noted, the county’s “discretionary function” argument simply does not come into play when this Tenn. Code Ann. § 29-20-203(a) waiver of immunity is implicated.

The other related issue is whether the *decision* not to install guardrails in the instant case is a discretionary function, which, under Tenn. Code Ann. § 29-20-205(1), has the effect of leaving immunity from suit in place. The plaintiffs do not argue that the trial court incorrectly interpreted and/or applied *Helton* as to the “decision” issue. This being the case, we will not further address the *decision* of the county not to install guardrails.

We note in passing that we agree with the trial court’s holding that, once the decision was made by the county to install guardrails, its failure to do so within the two week time frame that preceded the accident, could not reasonably be construed as negligence. This being the case, we find no genuine issue of material fact pertaining to this two week “delay.”

Returning to the first of these two related issues, we note that the plaintiffs argue that a genuine issue of material fact remains as to whether the lack of guardrails made the bridge “defective, unsafe, or dangerous.” We disagree with the plaintiffs’ assessment of the facts in this case.

The trial court evaluated the facts in this case in light of the factors set forth in *Helton*. See *Helton*, 922 S.W.2d at 882 n.10. The facts before the trial court, and now before us, show that (1) the bridge had never been equipped with guardrails; (2) it was built over 80 years ago; (3) it “served less than seven families”; and (4) as far as anyone could recall, there had been only one accident on the bridge in the past, and that mishap involved a drunk driver. The trial court, in making its analysis under *Helton*, noted that the plaintiffs had used the bridge without any problem at least once a day *for over 20 years*. We agree with the trial court’s implicit holding that reasonable minds could not disagree as to whether the lack of guardrails made the bridge “defective, unsafe, or dangerous.” Clearly, reasonable minds could not disagree as to this critical issue. The lack of guardrails did not make this particular bridge “defective, unsafe, or dangerous.” We disagree with the plaintiffs’ assertion that the trial court improperly weighed the evidence in making its summary judgment analysis. All the court did was to recognize that all of the relevant facts conclusively showed, *as a matter of law*, that, in this case, a lack of guardrails did not make the bridge “defective, unsafe, or dangerous.”

We find no error in the trial court's holding that the bridge was not "defective, unsafe, or dangerous" as a result of the lack of guardrails. It follows that immunity was not waived under the language of Tenn. Code Ann. § 29-20-203(a). The trial court correctly granted summary judgment as to all issues pertaining to the guardrails.

V.

While we agree with the trial court's grant of summary judgment as to the issues pertaining to guardrails, we observe that the defendant's motion asserting immunity as to the guardrails does not, in any way, address the plaintiffs' theory of recovery based upon their assertion that the bridge was "defective, unsafe, or dangerous" *due to a deteriorating curb*. We have no idea as to whether this rendered the bridge "defective, unsafe, or dangerous," nor do we know whether there is proof that the deteriorating curb was a proximate cause of this accident. What we do know is that the deteriorating curb was a part of the plaintiffs' theory of why they were entitled to recover. Since this theory was not addressed, in any way, by the material filed in support of the county's motion, there was no obligation on the part of the plaintiffs to prove this theory at this juncture in the proceedings. This is because the burden never shifted to the plaintiffs on this factual issue in this "battle on the papers." *See Staples*, 15 S.W.3d at 88. When the factual material before us is viewed in the light most favorable to the plaintiffs, we conclude that summary judgment was not appropriate as to the plaintiffs' theory that a deteriorating curb rendered the bridge "defective, unsafe, or dangerous" under Tenn. Code Ann. § 29-20-203(a).

VI.

We affirm the trial court's grant of summary judgment (1) as to the plaintiffs' complaint that the bridge in question was "defective, unsafe, or dangerous" because of a lack of guardrails and (2) as to the suggestion that the county's decision not to install guardrails amounted to negligence. We reverse the trial court's grant of summary judgment as to plaintiffs' complaint that the bridge was "defective, unsafe, or dangerous" because of a deteriorating curb. This case is remanded to the trial court for further proceedings. Costs on appeal are taxed one-half to John R. Reed and Margaret Reed and one-half to Carter County.

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CHARLES D. SUSANO, JR., JUDGE